

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
PRACTICE DIRECTION 61
RULING ON SPECIAL PLEA

Case Title: RK Investment CC 1 st Plaintiff Cedrick Kamwi 2 nd Plaintiff and Union Tiles Windhoek (Pty) Ltd Defendant Malls Tiles (Pty) Ltd Third Party	Case No: HC-MD-CIV-ACT-CON-2019/04266
Coram: Prinsloo J	Division of Court: High Court, Main Division
	Heard: 1 March 2023 Delivered: 20 March 2023
Neutral citation: <i>Malls Tiles (Pty) Ltd v Union Tiles Windhoek (Pty) Ltd</i> (HC-MD-CIV-ACT-CON-2019/04266) [2023] NAHCMD 134 (20 March 2023)	

ORDER:

1. The third party's special plea of jurisdiction is dismissed with costs. Such costs are limited in terms of rule 32(11).
2. The matter is postponed to 13 April 2023 at 15h00 for a further pre-trial conference.
3. The parties must file a varied proposed pre-trial report on or before 10 April 2023.

REASONS FOR ORDERS:

PRINSLOO J:

[1] Before me is a special plea of jurisdiction raised by the third party (Malls Tiles) to the effect that this court does not have jurisdiction over a peregrine third party.

[2] The applicant (third party) is Malls Tiles (Pty) Ltd, a company duly incorporated in terms of the South African Companies Act, with its principal place of business at 18 Pascoe Road, Mobeni, Durban, Republic of South Africa. The third party is represented by Mr Tjiteere.

[3] The defendant is Union Tiles Windhoek (Pty) Ltd, a company registered with a Namibian registration number 2008/082 and incorporated in accordance with the applicable laws of the Republic of Namibia, with its principal place of business at the corner of Mandume Ndemufayo Ave & Daimler Street, Windhoek, Republic of Namibia. The defendant is represented by Mr Mouton.

Background

[4] On 24 September 2019, the first and second plaintiffs caused a combined summons to be issued against the defendant, in terms of which the plaintiffs claim, inter alia, the following relief:

‘ 1.1 An order confirming that the Sale Agreement between the parties was validly cancelled and the Plaintiffs hereby tender restitution of the defective goods.

1.2 An order directing the Defendant to repay back to Plaintiff the purchase price in the amount of N\$ 170 000 – 00 (One Hundred and Seventy Thousand Namibian Dollars).

1.3 An order directing Defendant to compensate Plaintiff in the amount of N\$1 126 828,88 (One Million One Hundred Twenty-Six Thousand Eight Hundred and Twenty-Eight Namibian Dollars Eighty-Eight Cent) being the cost for repairing and replacing the damaged goods on the 12 housing units.'

[5] As can be gleaned from the relief sought, the claim instituted by the plaintiff relates to tiles which the defendant delivered, which were allegedly defective, and which defects caused the plaintiff consequential damages.

[6] On 22 June 2021, the defendant commenced third party proceedings against Malls Tiles in terms of r 50 of the Rules of the High Court. The defendant caused a third party notice to be served on Malls Tiles claiming, amongst others, an indemnification and/or a contribution from the third party regarding a claim so instituted against the defendant by the plaintiff for repayment of the amounts of N\$170 000 and N\$1 126 828.88, respectively.

[7] It is the case of the defendant that the said tiles were ordered and purchased from Malls Tiles, and it claims that in the event of it being found that such tiles were indeed defective as alleged by the plaintiff (which is denied), then Malls Tiles ought to be held liable. The defendant further maintains that the plaintiff is aware that the tiles were manufactured by the third party and delivered to it (the defendant) for onward sale to the plaintiff.

[8] In amplification of its claim for an indemnification and/or a contribution against the third party, the defendant alleges that the issues in the main action between the plaintiffs and the defendant are substantially the same as a question or issues which have arisen or will arise between the defendant and the third party and should properly be determined, not only as between the plaintiff and defendant but also between the defendant and the third party.

[9] The defendant, in its claim against Malls Tiles, alleges among other things, in the third

party notice that:

9.1 The agreement between the defendant and the third party was orally concluded between the defendant and representatives of the third party in Windhoek.

9.2 The said tiles were delivered to the defendant by the third party in Windhoek.

[10] Malls Tiles pleaded to the third party notice in the following terms:

‘10.1 The Third Party admits that, during 2018, and in Cape Town, it, represented by Imraan Shaik, concluded a partly oral, partly written contract with the Defendant represented by Vivienne Vilbert.

10.2 The Third-Party does not have either its registered address or its principal place of business within Namibia.

10.3 The contract (between Third-Party and Defendant) was concluded in Cape Town, Republic of South Africa and the goods were delivered to the Defendant’s nominated transport in Cape Town.

10.4 The cause of action did not arise in Namibia nor is the Third-Party in Namibia.

10.5 Therefore (with reference to the aforesaid and as pleaded above) this Honourable Court does not have jurisdiction to entertain the Defendant’s claim against the Third-Party.’

[11] The defendant avers that on or about 5 September 2022, it obtained a court order which authorised and directed the Deputy Sheriff of Windhoek to attach ad fundandam jurisdictionem alternatively, ad confirmandam jurisdictionem:

11.1 The tiles/goods of the third party so stored and/or kept at 20 Smith Street, Pioneerspark, Windhoek, Namibia,

11.2 Attaching and taking possession of such tiles/goods.

11.3 Leaving a certificate of the Court Order on the Court's file, such certificate, to indicate that such attachment and taking of possession of the tiles/goods has been attached.

11.4 Serving a copy of the Court Order on the residents at 20 Smith Street, Pionierspark, Windhoek, Namibia.

[12] The defendant avers that the Deputy Sheriff, in compliance with the Court Order dated 5 September 2022, on 6 September 2022, attached ad fundandum jurisdictionem alternatively, ad confirmandam jurisdictionem all tiles/goods stored and/or kept at 20 Smith Street, Pionierspark, Windhoek, Namibia, belonging to the third party, Malls Tiles.

[13] The third party submits that it is neither aware of the process above instituted by the defendant nor that there is an order of this court against it in those terms. The third party further submits that no documents were served on it. However, the third party contends that even if it had been served or notified about that process, it would not have opposed the proceedings because the third party does not have tiles or goods stored or kept at 20 Smith Street, Pionierspark, Windhoek. In amplifying its contentions, the third party submits that the defendant merely fabricates its allegations to cure an obvious issue concerning the special plea raised.

[14] The third party maintains that its registered office and principal place of business is at 16/18 Pascoe Road, Mobeni, Kwa-Zulu Natal, Republic of South Africa.

Applicant's (third party's) arguments

[15] Mr Tjiteere persists with the position that even after so many amendments (in re the notice of amendments of the third party notice), the defendant did not cure the complaint or the point of law taken by the third party, in that the pleadings of the defendant do not contain allegations that the third party is physically present in Namibia.

[16] Further, and to the knowledge of the third party, no order attaches or confirms this court's jurisdiction insofar as it relates to the third party. Mr Tjiteere submits that the third party

does not have its registered address or its principal place of business within Namibia.

[17] Mr Tjiteere contends that the third party and the defendant's relationship was brought about by a contract concluded between the parties in terms whereof the defendant purchased certain goods from the third party. The third party submits that this mere contractual relationship is not enough for this Honourable Court to have jurisdiction over the third party.

Defendant's arguments

[18] Mr Mouton submits that the cause of action, i.e. defective tiles emanating from the third party delivered to the defendant for onward sales to the plaintiff, arose within the jurisdiction of this court.

[19] Mr Mouton further submits that this court has jurisdiction over the third party because the defendant, on 6 September 2022, caused an attachment of the property of the third party *ad fundandum jurisdictionem* alternatively, *ad confirmandam jurisdictionem*.

[20] Mr Mouton argued that the contract between the defendant and third party was concluded in Windhoek either when Vivienne Vilbert entered into the agreement with Pieter Slabber or when Vivienne Vilbert, on behalf of the defendant, signed the pro-forma invoice so received from the third party, in Windhoek on 26 April 2018.

[21] Mr Mouton submits that the agreement between the parties, i.e. to purchase tiles, was executed in Namibia when such tiles purchased from the third party were delivered in Windhoek by an independent transporter. In addition, when the tiles belonging to the third party were attached by order of the court, it further found and/or confirmed the jurisdiction of this court.

[22] Mr Mouton argues that it consequently follows that where the defendant is an *incola* of this Court and is able to attach property belonging to the third party within the area over which this Court exercises jurisdiction, the court is entitled to assume jurisdiction based on such

attachment.

Issues to be decided

[23] The issue between the parties to determine is simply whether this Court has jurisdiction over a peregrine third party, Malls Tiles.

Legal Principles

[24] Section 2 of the High Court Act, 16 of 1990 (the Act) vests the High Court with “jurisdiction to hear and to determine all matters which may be conferred or imposed upon it by this Act or the Namibian Constitution or any other law.” Section 16 of the Act further provides for the “persons over whom and matters in relation to which the High Court has jurisdiction.”

[25] The relevant part of section 16 provides the following:

‘The High Court shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia *and all other matters of which it may according to law take cognisance*, and shall, in addition to any powers of jurisdiction which may be vested in it by law, have power...’ Underlined for my emphasis.

[26] The common law grounds on which the High Court has jurisdiction to hear a case are: (a) the defendant is within the Court’s area, (b) that the cause of action arose within the Court’s area, (c) that there was an attachment to found or confirm jurisdiction, or (d) that the defendant has submitted to the Court’s jurisdiction.¹

[27] In *Joseph and Snyman v Freedom Square*², Miller J referred to the matter of *SOS*

¹ Joubert WA (2008) *The Laws of South Africa* Vol 11 p 500, para 545.

² *Snyman v Freedom Square* (I 1192-2014) [2015] NAHCMD 161 (9 July 2015).

*Kinderdorf International v Effie Lentin Architects*³, where the court postulated that:

‘In terms of our law, a court will not have jurisdiction against a peregrine defendant unless the plaintiff, even though he may be an *incola*, attaches the property of the defendant either to confirm or to found jurisdiction.’

[28] In *Namibia Bunker Services (Pty) Ltd v ETS Katanga Futur and Another*⁴ Van Niekerk went even further and stated as follows:

‘[39] Furthermore, I do not agree with the contention that because of the factors set out in (i) to (vi) above, attachment is unnecessary. Where, as in this case, an *incola* wishes to sue a peregrine defendant to enforce a claim sounding in money, it is still necessary for the *incola* plaintiff to attach the property of the *peregrinus* to confirm jurisdiction even if the Court has jurisdiction based thereon that the cause of action arose within the Court’s jurisdiction.’ (My emphasis)

[29] In the matter of *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd*⁵, the court, in answering the question of who is peregrine and *incolae* held that:

‘1.1 In the case of natural persons, an *incola* is a person resident or domiciled in the area of jurisdiction of the court.

1.2 In the case of a corporation, a corporation is domiciled (and, according to the majority, resident) where it is registered.

2. Peregrini are those other than *incolae*.’ Underlined for my emphasis

Discussion

[30] As I indicated earlier, this court has to decide whether the court has jurisdiction over the peregrine (Malls Tiles). The defendant, in its papers, relies on an *ex parte* application brought

³ *Kinderdorf International v Effie Lentin Architects* 1992 NR 390 HC.

⁴ *Namibia Bunker Services (Pty) Ltd v ETS Katanga Futur and Another* 2015 (2) NR 461 (HC) at para 39.

⁵ *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1969 (2) SA 295 (A).

on an urgent basis before my Brother Sibeya J on 5 September 2022 and the subsequent confirmation of the rule nisi by this court on 14 October 2022. The court confirmed the rule nisi issued on 5 September 2022, in which order the court authorised and directed the Deputy Sheriff for the District of Windhoek to attach, *ad fundandam jurisdictionem* alternatively *ad confirmandam jurisdictionem*, the tiles/goods of the respondent (the third party in those proceedings) so stored and/or kept at 20 Smith Street, Pioneerspark, Windhoek, Republic of Namibia, by attaching and taking possession of such tiles or goods. The order confirming the jurisdiction was attached to the defendant's papers in support of its contentions but not the rule nisi granted on 5 September 2022. Although I raised specific questions with the defendant's counsel regarding the rule nisi granted and the return of service confirming the attachment, I cannot lose sight of the fact that the rule nisi and confirmation thereof are valid court orders⁶ with a legally binding effect and will remain as such until set aside by a court of competent jurisdiction. The rule nisi was not opposed by either the third party or the occupant of 20 Smith Street, Pioneerspark, Windhoek, one Mr Slabber.

[31] Mr Slabber was identified in the defendant's papers filed of record as an agent of the third party. The third party maintains their opposition to the amendment to the third party notice that Mr Slabber was an independent contractor who would refer business to the third party and earn commission as a result. It was further maintained by the third party that Mr Slabber was neither a representative of the third party nor did he manage any branch or businesses of the third party in Namibia. Despite the contentions by the third party, it is clear that there is a link between the third party and Mr Slabber and the stock that the Deputy Sheriff attached.

[32] The court in the urgent application was satisfied on the papers that the defendant (applicant in the urgent application) made out a case for an order founding jurisdiction. Therefore, I will stand by this court's previous order and must find that this court has jurisdiction over the third party.

[33] The third party further raised the issue that the cause of action did not arise in Namibia but indeed in Cape Town, Republic of South Africa and that the third party delivered the tiles at

⁶ HC-MD-CIV-MOT-EXP-2022/00409. Rule Nisi confirmed on 14 October 2022.

the independent transporter of choice of the defendant. The defendant disagrees with the contention that the agreement between the parties came into being in Cape Town.

[34] From the pro forma invoice that the third party relies on for its plea, it appears that it was forwarded to the defendant, and Ms Vivian Vilbert accepted the invoiced price on behalf of the defendant. The pro forma invoice directs the client to 'sign and fax back as acceptance'. The acceptance occurred in Windhoek, and the defendant electronically forwarded the invoice to the third parties' offices in Cape Town.

[35] I am at pains not to oversimplify the agreement between the parties, but from my reading of the papers, the basic requirements for the existence of a valid agreement are present, i.e.

a) Agreement or meeting of the minds (consensus) of the contracting parties to enter into an agreement of sale (the submission of the pro forma invoice and the acceptance thereof);

b) Agreement on the thing sold (the tiles and quantities clearly defined); and

c) Agreement on the purchase price to be paid for the thing sold (the price was accepted on behalf of the defendant).

[36] All the aforementioned were present at the time when the defendant accepted the pro forma invoice, which occurred in Windhoek. Therefore the cause of action arose in Windhoek, placing the matter within the jurisdiction of this court.

[37] Considering the arguments for and against this court having jurisdiction over the peregrine defendant, this court must unequivocally find that it has jurisdiction over the third party. My order is set out above.

Judge's signature:

APPEARANCES:	
<p style="text-align: center;">Plaintiff</p> <p style="text-align: center;">F. Bangamwabo Of FB Law Chambers, Windhoek (Watching Brief)</p>	<p style="text-align: center;">Defendant</p> <p style="text-align: center;">C Mouton (instructed by Neves Legal Practitioners), Windhoek</p> <p style="text-align: center;">Third Party</p> <p style="text-align: center;">M Tjiteere of DR Weder Kauta & Hoveka, Windhoek</p>